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JAN 23 2001

Olga Rivera, Director  
Public Water Supply Supervision Program  
Puerto Rico Department of Health  
Nacional Plaza Building  
431 Ponce De Leon Ave.  
9<sup>th</sup> Floor, Suite 903  
Hato Rey, Puerto Rico 00917

Re: Safe Drinking Water Act Primacy Revision Application, Prospective Adopt by Reference Provisions of PRDOH's General Regulation of Environmental Health, Audit Privilege/Immunity Law and Administrative Penalty and Emergency Plan Clarification

Dear Ms. Rivera:

The U.S. Environmental Protection Agency (EPA) Region 2 is currently in the process of reviewing the Puerto Rico Department of Health's (PRDOH) Safe Drinking Water Act (SDWA) Primacy Revision Application package dated August 21, 2000. As part of this process, the EPA has reviewed both Puerto Rico's recently enacted "General Regulation of Environmental Health" ("General Regulation" effective March 6, 2000) and the Puerto Rico Attorney General's (PRAG) correspondence dated August 21, 2000, to Jeanne M. Fox, Regional Administrator of EPA Region 2.

Incorporation by Reference

PRDOH's "General Regulation of Environmental Health" (Regulation No. 6090) contains the following provisions with regard to adopting by reference EPA's drinking water regulations as codified at 40 CFR Parts 141, 142 and 143:

Chapter II, Article II, Section 1.01 - "The primary standards for drinking water in Puerto Rico will be regulated pursuant to the provisions contained in Title 40 CFR Part 141 of the Code of Federal Regulations and its amended versions."

Chapter II, Article II, Section 1.02 - "The implementation of primary standards in Puerto Rico will be consonant to the provisions established in Title 40 CFR Part 142 and its amended versions."

Chapter II, Article II, Section 1.03 - "The secondary standards for drinking water will be regulated pursuant to the provisions contained in Title 40 CFR Part 143 and its amended versions."

EPA is requesting assistance in clarifying PRDOH's intent in adopting the above provisions. Specifically, given the effective date (March 6, 2000) of the "General Regulation" EPA is inferring that all final federal drinking water regulations found in the referenced Parts of Title 40 of the Code of Federal Regulations ("CFR") that were published final in the Federal Register as of March 6, 2000 were intended by PRDOH to be incorporated by reference in the "General Regulation" and hence made provisions of Commonwealth regulation. If this were indeed PRDOH's intention, please clarify such.

Of additional concern is the "and its amended versions" language which is included in the above provisions. EPA is not certain as to whether PRDOH also intended the "General Regulation" to incorporate by reference future revisions to the federal drinking water regulations occurring after the date of adoption of the General Regulation (March 6, 2000).

To the extent that PRDOH intended to adopt future federal drinking water regulations, this could also be considered a prospective incorporation of Federal regulations by reference. A number of reviewing State courts in other jurisdictions have held that State statutes and regulations that purport to adopt prospectively Federal legislation or regulations, without intervening action by appropriate state legislative or executive bodies, represent an unconstitutional delegation of legislative authority. Specifically, it is not clear to EPA that the Secretary of the PRDOH will have the opportunity to exercise discretion in adopting future additions or revisions to the federal drinking water regulations as amendments to the "General Regulation" or whether such additions or revisions automatically amend the General Regulation without intervening Commonwealth action.

If the PRDOH intended the "General Regulation" to incorporate future additions or revisions to the federal drinking water regulations automatically, then the Commonwealth's Attorney General will need to address, in a clear and convincing manner, the legal basis for such "prospective incorporation by reference". On page 2 of the Attorney General's August 21, 2000 letter there is a brief reference to the issue of prospective incorporation -- "For the sake of evidencing its unequivocal intent to comply with all SDWA requirements and with the SDWA Amendments, in particular, in Article II § 1.02 of PRDOH Regulation No. 6090 the PRDOH adopted the totality of 40 CFR Part 141 (sic), as amended from time to time, by reference." However, a more substantial Attorney General's Statement, citing specific Commonwealth authority that allows the PRDOH to promulgate and enforce regulations in this manner, would help clarify for EPA

what was intended by the "and its amended versions" language of §§ 1.01, 1.02 and 1.03.

#### Audit Privilege/Immunity Laws

In addition to the above, in order to evaluate PRDOH's request for primacy approval, Puerto Rico's Attorney General or independent legal counsel will need to certify that the Commonwealth's environmental audit privilege and/or immunity law (if any) does not affect PRDOH's ability to meet enforcement and information gathering requirements under the SDWA.

EPA guidance (see enclosure Section titled Guidance For States on Audit Privilege and/or Immunity Laws) recommends that the certification be reasonably consistent with the wording of the Commonwealth's audit privilege and/or immunity law and demonstrate how the overall PWSS program approval criteria are satisfied.

The enclosure also provides model language developed by EPA that can be used by your Attorney General's office in drafting an appropriate certification after determining whether PRDOH's ability to meet enforcement and information gathering requirements have been affected by any Commonwealth's audit privilege and/or immunity law. In order to expedite this process, I would suggest that the attached form be forwarded to the AG's office with a request to select which of the 3 examples is applicable to PRDOH's situation. The certification can then be developed accordingly and forwarded to EPA Region 2 as a stand-alone document. As indicated in your December 28, 2000 letter, PRDOH will submit the Guidance on Audit Privilege and/or Immunity Laws to the Attorney General so that the applicable option is chosen and indicated to PRDOH, and in turn, Region 2.

#### Small System Penalties/Emergency Circumstances

As a separate item from the AG certification discussed above, I am also requesting clarification on the following items: a brief description of PRDOH's intent to implement its authority for administrative penalties that will ensure adequate compliance of systems serving a population of 10,000 or fewer individuals and a clarification/confirmation on how PRDOH's Action Plan for Disasters covers emergency circumstances including, but not limited to, earthquakes, floods, hurricanes, and other natural disasters.

As indicated in the December 28, 2000 letter, PRDOH will provide 1) a protocol or guidance from PRDOH Legal Division and PRDOH Administrative Hearing Division that ensures adequate compliance of systems serving less than 10,000 and 2) a letter signed by either the Secretary of Health or the Assistant Secretary for Environmental Health giving clarification/confirmation on how PRDOH's Action Plan for Disasters covers emergency circumstances including, but not limited to earthquakes, floods, hurricanes and other natural disasters.

Other Items

Region 2 will provide a revised MOU, pertaining to an extension request for the MDBP Rules under separate cover. Be advised that such extension request must come from the PRDOH Secretary.

An official translation of the March 6, 2000 General Regulation No. 6090 must be provided to EPA Region 2.

If you have any questions or wish to discuss this matter further, please contact me at (212) 637-3879 or have your staff contact Mike Lowy at (212) 637-3830.

Sincerely,

Bruce Kiselica, Chief  
Drinking Water Section

bcc: Michael Lowy, DEPP-WPB-DWS  
Doughlas McKenna, DECA-WCB-PWS  
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Enclosure